IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 981 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH Sd/-
HONOURABLE MR.JUSTICE D.H.WAGHELA Sd/-

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ? 1 to 5 NO

==========

ABDULLAKHAN HASANKHAN MALEK - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

==========

Appearance :

THROUGH JAIL for Appellant(s):1,MS SADHANA SAGAR for Appellant(s): 1,
MR AJ DESAI A.P.P. for Opponent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 29-/12/2005

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

1. This appeal is preferred from the judgment dated 12.9.2000 of the learned Additional Sessions Judge, Jamnagar whereby the appellant is convicted of

the offence punishable under section 302 of the Indian Penal Code, 1860 and sentenced to imprisonment for life and fine of Rs.250/- and in default to further imprisonment for one month. The appellant was aged 19 at the time of the commission of the offence in March, 1993 and he is alleged to have killed his father, the victim of the offence.

2. The appellant was the eldest son among the three children born of the earlier marriage of the victim but the marriage had ended by a divorce in 1986 and the children along with the divorced wife had gone to live with her brother,after seven years of which the mother of the appellant had passed away while the victim had married again. According to prosecution, the victim was insisting upon the appellant to undergo the course of P.T.C.at Surendranagar, but he was not pursuing that course and had come to live with the victim about a week before the incident.

3. According to the prosecution case, the appellant was getting excited while telling the difficulties faced by his mother and brothers after the divorce. In the early hours of around 5.00 in the morning on 29.3.1996, the deceased had offered namaz in the mosque where he was staying and the appellant was sleeping in the nearby room. While the victim had gone to sleep again, at around 7 a.m. the appellant knocked the door of his room, the victim opened it and went to sleep again after telling him that he

should eat “khitchadi”, lying in a receptacle, for the breakfast. While the victim was sleeping again after covering his body with a blanket, some liquid was poured over his body and the appellant had shouted as though he was calling his father. When the victim removed the blanket to look out, he found the appellant standing there and then the appellant threw a lighted torch at him because of which the victim started burning alongwith his clothes. While he raised the alarm by shouting and opened the door, the appellant went away. Some visitors to the mosque and neighbours rushed to the spot and took the victim to the hospital in a rickshaw. A police inspector registered an FIR on the basis of the oral statement of the victim made in the hospital and a dying declaration was recorded through an Executive Magistrate before the victim died at 9.00 p.m.on 3.4.1996. The appellant was arrested thereafter on 3.5.1996.

4. During the course of trial, the factum of death of the victim due to burns was not disputed. There was also no dispute about the fact that the victim had married another wife even before divorcing the mother of the appellant and that there were two children born of the second marriage.

5. According to the panch witness Arab Mustaf Mehredbin Mohammed (Ex.4), a plastic can with some oil in it and a few burnt pieces of clothes were recovered from the place of the incident. According

to the panchnama (Ex.15), the place of incident was a room on the first floor in which some clothes, a bag etc. were found in burnt condition and there was a kitchen stand on which an electric oven (hot-plate) with a small receptacle containing “Khitchadi” were also found. Remarkably, there was found lot of water sprinkled on the floor of the room and the liquid in the can was not confirmed to be kerosene although the investigating officer deposed that there was about 1-1/2 litres of kerosene left in the plastic can. The panch of the inquest panchnama, namely, Abdulbhai Ibrahim Jokhiya had turned hostile in the Court, but deposed at Ex.13 that he had seen the dead body of the victim and seen that lips, hair on the head, nose and fingers of the deceased were in burnt condition. According to the panchnama Ex.51 also, the deceased had serious burn injuries all over his body.

5.1 According to Dr.Mehta's deposition Ex.43, the deceased was brought to the hospital at about 8.05 a.m. On 29.3.1996 and was transferred to the burns ward on 30.3.1996 where he was found to have 60-65% deep burns on his neck, chest, belly, hands and legs. On the basis of that evidence and in absence of any suggestion to any witness of suicide or accidental death, the trial Court recorded the finding of culpable homicide.

5.2 According to the prosecution witness (PW.2) Abbas Jivabhai (Ex.11), the deceased was working as Imam in the mosque and living there. On the fateful

day, when the witness was doing cleaning in the mosque, he had heard the sound of a thud from the room of the victim and thereafter the sound of somebody running down the stairs after which the deceased had also come down shouting from his room in burning condition. He tried to save the deceased by covering his body with a towel and a few other persons also gathered. According to him, the deceased was telling that he was burnt by the child. He had, however, never seen the appellant before the trial. And, the person first running away from the room was not stated by him to be the appellant, but the Court believed, on the basis of the statement of the investigating officer, that he had stated that before the investigating officer. The other witness immediately rushing to the spot was Mohammed Siddik @ Sidu (Ex.12) who also stated that the deceased had told that the child had burnt him. He admitted that he had never seen the appellant, that the victim was in such a serious condition that he could not hear or speak anything and had not spoken while being taken to the hospital. Thereafter, when the deceased was transferred to an air-conditioned room in the hospital, he was unable to speak even after two days, according to him.

-

5.3 However, the medical case papers produced at Ex.44 showed that one Dr.Srinivasan had written in the 'history-column', at the time of admitting the deceased, that he was burnt by his son while he was

sleeping at around 7 0' clock. That Dr.Srinivasan was not examined in evidence on the ground that he had returned to his native place in Kerala and his whereabouts were not known. The aforesaid note of history and the note certifying cause of death in Ex.44 was found to have been tampered by erasures and additions in the same handwriting.

5.4 Another witness, police constable Maya Deva (Ex.36), deposed that he was the police constable on duty at the hospital and he had come to know from the deceased that his son had burnt him and had sent notes (Ex.37and 8) to the police station and to the Executive Magistrate for recording the dying declaration.

5.5 The Executive Magistrate, Mr.Rasiklal M. Mehta, deposed at Ex.7 that he had received the message (Ex.8) at 11.15 a.m. and recorded the dying declaration (Ex.9) in his own handwriting between 11.45 a.m. and 12.12 p.m. when none else was present. He stated that he had retired since last three years after recording of the dying declaration and still preserved with himself the original copy of the dying declaration. He could not name any doctor who was on duty at the time of recording the declaration. However, the dying declaration (Ex.9) was accepted as reliable on the basis that the signature thereunder purported to be that of the deceased matched with the signature below the complaint (Ex.60) recorded by the investigating officer.

5.6 The investigating officer, police inspector Mr.Chaaran (Ex.59) deposed that he had visited at around 11.15 a.m. the ward where the deceased was lying on a cot and had questioned him after verifying that he was conscious and recorded through a writer his complaint (Ex.60). The doctor certifying in the margin that the deceased was in a position to give statement was not examined in evidence.

6. It is clear from the above record of evidence that there was no eye witness to the incident of alleged burning of the deceased by the appellant, and there was no evidence of his suddenly escaping from the room after a loud thud; but there was evidence to the effect that the the appellant had recently come to stay with the deceased. Thus, the case against the appellant was based on circumstantial evidence and the dying declaration.

6.1 In view of the apparent lack of a strong motive or any sudden provocation which could prompt a son to kill his father who had just told him to take his breakfast early in the morning, the case called for closer scrutiny of the evidence. According to the deposition of the two eye witnesses who had immediately rushed to douse the fire and take the victim to hospital, the deceased was not in a position to speak or sign and none had seen the appellant around or escaping. The doctor who certified the deceased to be in a position to make a

statement either before the investigating officer or the Executive Magistrate was not examined in evidence. In such circumstances, reliance upon the statements at Exs.60 and 9, because signatures of the deceased on both matched and the officers concerned were independent officers, appeared to be almost exclusively dependent upon that.

7. It was seen that Maya Deva (PW.12) who first made a note of the medico legal case at the hospital and who sent a note (Ex.8) for taking dying declaration had admitted in his deposition (Ex.36) that the time entered by him for the relevant entry in the MLC Register was tampered and erasures were not marked by signature of anyone. That was the only entry made by him since all other entries were made by someone else. According to him, he was called for by a chit by a doctor and, although that chit was not available, the time mentioned was 8.00. In the note prepared and produced by him (Ex.37), no time is mentioned and no other details of the condition of the patient is mentioned, but only the allegation against the appellant clearly mentioning that the patient was burnt by his son by sprinkling kerosene is mentioned. It was suggested to him and denied that that note Ex.37 was made afterwards. He also claimed to have written the note (Ex.8) calling upon the Executive Magistrate to take dying declaration. The note (Ex.8) does not show the time of its writing, sending or receipt at the office of the Executive Magistrate, but contains a remark at the bottom to

the effect that the patient was conscious and able to give statement and the signature below that remark is purported to have been put on 29.3.1996 at 11.45 a.m. That note (Ex.8) was produced for the first time in the Court from his own custody by the Executive Magistrate Shri R.M.Mehta during his deposition at Ex.7 and the production thereof was objected by the defence but the objection was over-ruled. He deposed that the doctor on duty had directed him to the cot of the patient and that doctor had written his opinion on Ex.8. He also produced the dying declaration (Ex.9) which was recorded by him. He stated that the original was kept by him and a copy thereof as given to a police constable. He clearly deposed that there was absolutely no one else when Ex.9 was recorded by him. In his cross-examination, he admitted that he could not remember the name of any doctor and could not say which doctor had made the remark below Ex.8. He also admitted that he could not depose as to how many other cots and patients were around in the ward and what was the blood pressure of the patient at the time the dying declaration was recorded. He did not enquire as to the treatment or injections administered to the patient. Admittedly, the doctor had not examined the patient in his presence and he had asked only three questions while the patient was covered by a blanket due to which he could not see his physical condition. The dying declaration (Ex.9) does not contain any remark either by the deponent or by any doctor to show the patient's physical condition and its

recording is stated to have been started at 11.45 and completed at 12.12. According to that statement (Ex.9), his son had poured kerosene upon him at around 7.00 after entering his room and lighted a match to fire a torch. Upon his waking up, he had thrown the torch at him and escaped. He did not have any quarrel with his son and he expressed his suspicion that maternal uncle of his son might have told him to do such thing.

7.1 In the context of the above deposition of the Executive Magistrate and the dying declaration purported to have been signed by the deceased, deposition of the investigating officer Mr.B.D.Chaaran (Ex.59) requires to be compared and examined. He deposed that he reached the hospital at 11.15 a.m. and recorded the statement (Ex.60) through a writer. He deposed that the statement/complaint (Ex.60) of the deceased was recorded according to his statement and the remark of the doctor about his consciousness was recorded in the margin which remark contains his signature and the time of putting it is shown to be 11.25 a.m. That statement also contains signatures of the deceased at three places. According to him, the patient was in his clothes when he reached to his cot and he did not notice or note his cot number or any burn injuries on the patient. He also could not name or identify the doctor whom he had seen at the hospital. He admitted that he had not seized any article or the mattress, the blanket or the pillow from the room of the deceased and he could

not remember whether the patient was sitting or lying at the time of recording of the statement. He also admitted that he did not ask any question about the injuries on the body of the deceased. At one stage, he admitted to have forgotten everything on account of passage of four years.

7.2 The statement (Ex.60) is a detailed statement running into three handwritten pages in which are given details of the family and matrimonial life of the deceased. Regarding the incident of burning, it is stated therein that he had offered his namaz at 5.30 in the morning when his son was sleeping in the nearby madressa. His son had knocked his door at 7.00 a.m. and he had gone to sleep again after opening the door and telling his son to eat khitchadi and ghee. When he had gone to sleep again and covered himself, some liquid was poured over him. At that time, his son had shouted “Abba” and when he looked out from the cover, the appellant was standing before him and he threw a lighted torch at him because of which his body started burning with his clothes. Then Abdulla, the appellant, had left and he had opened the main door of the mosque. Abbas, who was in the mosque, had come running to him and tried to douse the fire.

7.3 If the dying declaration made in reply to the three questions by the Executive Magistrate took time from 11.45 a.m. to 12.12 p.m., the detailed statement (Ex.60) started after 11.25 a.m. could have

taken longer and it was impossible that the police inspector Mr.Chaaran and the Executive Magistrate could not have seen each other. It is also remarkable that both the officers could not name or identify any doctor who had treated or certified the deceased to be conscious and in a position to give statement. It is also highly improbable that the Executive Magistrate would be absolutely alone with the patient at the time of recording of the dying declaration. In such circumstances, reliance upon similarity of signatures found on the dying declaration (Ex.9) and the statement (Ex.60) required further corroboration at least by comparison of the signature with the signature of the deceased on any document previously executed by him. This has also to be examined in the context of lack of any evidence in respect of the movement on that day and timing thereof of the Executing Magistrate and the investigating officer. It has to be noted that production and exhibition of all the important documents produced vide the list Ex.6 and marked as Ex.6/1, 3, 6, 7, 9, 12, 13, 14, 15, 18, 19 and 20 was objected by the appellant's advocate on the ground that those documents were not included in the chargesheet and copies thereof were not supplied in advance.

7.4 One more important factor strengthening the doubt was found in the deposition of the widow of the deceased (Ex.18), namely, Bilkis Bano Hasankhan. She deposed that when he met her husband in the hospital, he had told her that the appellant had torched him

after sprinkling kerosene on him. She admitted in her cross-examination that she had reached Jamnagar in the evening at around 6.00 to 7.00 p.m. She admitted that one-and-half months before the incident, the appellant had come to live with his father for ten days. Remarkably, she denied that she had any other talk with her husband except about the appellant having burnt him.

8. There were other circumstances creating further doubt against the version of the prosecution insofar as the deceased was in the practice of speaking in Hindi and Urdu only and, during the course of treatment spread over about a week, there was medical evidence of infection, chest pain, transfer from general ward to special ward and plastic surgery department and infections and septicemia. The medical papers at Ex.44 clearly showed deep burns on hands and the capacity of the deceased to use his fingers for putting his signature on any paper could be doubted. It is also remarkable that, though witness summons were applied for vide application Ex.19 to call five named doctors and the doctors treating the deceased as witnesses and summons were ordered to be issued to them, three of those doctors were expressly dropped and only the doctor performing postmortem was examined by the prosecution besides Dr.S.G.Mehta (PW.14 at Ex.43), who had not treated the deceased. This has to be seen in the context of lack of proof of the signatures below the remark about the victim's consciousness on

the note (Ex.8) and the statement (Ex.60). In the facts of the present case, it is doubtful whether the dying declaration was truthful and voluntary and whether the declarant was conscious and in his senses and in a fit condition to make a declaration.

8.1 It is a recognized position of law that the maker of dying declaration being not available for cross-examination, the person who recorded the dying declaration would maintain that it was correctly recorded and, therefore, the all important aspect as to what was the mental and physical condition of the patient has got to be proved by the prosecution through positive evidence which burden of proof is heavy in serious cases where the accused is facing gallows or imprisonment for life. It is of utmost importance that the doctor who certified the condition of the patient must substantiate that position because once that evidence comes, it lends authenticity to the dying declaration. As observed by a Division Bench of Karnataka High Court in **Adevappa Nagappa Anagolkar v. State of Karnataka [1998 Cr.L.J. 584]**, where such evidence is not forthcoming, defence loses the most valuable right of being able to establish that either because of the pain and injuries or the effect of the medication, the patient might not have been in either a fit mental or physical condition to cogently understand questions put and to give correct answers thereto. It is a rule of prudence that the certificate of a doctor must be substantiated and a government officer or a

police officer who casually comes to hospital, puts questions and takes down answers is certainly not the authority to be able to authoritatively and conclusively indicate the exact condition of the patient. As held by the Supreme Court in **Rasheed Beg & Others v. State of Madhya Pradesh [(1974) 4 SCC 264]**, where dying declaration is suspicious, it should not be acted upon without corroborative evidence.

8.2 In the case of **Smt. Paniben v. State of Gujarat [AIR 1992 SC 1817],** the Supreme Court summed up the principles of dying declaration with the following observation in para 17:

> *"17. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration....."*

9. In the above facts and circumstances and in absence of any direct evidence of the involvement of

the appellant, strong motive and any provocation, we are of the view that the offence of murder was not proved against the appellant beyond reasonable doubt. Therefore, this is a fit case in which benefit of doubt should be given to the appellant who has, otherwise also, been in jail for a total period of nine-and-a-half years including the period of four years and four months spent as an undertrial prisoner.

10. The Appeal is allowed. The judgment and order dated 12.9.2000 passed by the learned Additional Sessions Judge, Jamnagar in Sessions Case No.123 of 1996 is set aside and the appellant-accused is acquitted of the offence punishable under section 302 of the Indian Penal Code by giving him the benefit of doubt. The appellant-accused shall accordingly be released forthwith, if not required in any other case. Since the appellant-accused is already released on temporary bail, he shall report before the jail authority for completion of necessary formalities. Direct Service of the operative order is permitted.

Sd/-

(M.S.SHAH, J.)

Sd/-

(D.H.WAGHELA, J.)

(KMG Thilake)